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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 662

ETS-HOKIN & GALVAN, INC., a Foreign Corporation,
Petitioner,

vs.

MAAS TRANSPORT, INC., a North Dakota Corporation, and B. L. LAWRENCE, doing business as LAWRENCE TRANSPORTATION,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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MAAS TRANSPORT, INC., a North Dakota Corporation, and B. L. LAWRENCE, doing business as LAWRENCE TRANSPORTATION,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

Petitioner Ets-Hokin & Galvan, Inc., now by change of name Ets-Hokin Corporation, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above-entitled case on July 11, 1967.

I.

OPINIONS BELOW

The opinion of the Court of Appeals does not yet appear in the Federal Reporter and is reproduced herein as Ap-

pendix A. The unreported opinion of the District Court is reproduced herein as Appendix B.

II.

JURISDICTION

The judgment of the Court of Appeals was entered on July 11, 1967, and this appeal is therefore timely under 28 U.S.C. § 2101(c). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

III.

QUESTION PRESENTED

May a common carrier who has failed to file its tariff rates with the Interstate Commerce Commission in violation of the Interstate Commerce Act collect freight charges from a shipper pursuant to an oral agreement for an interstate haul?

IV.

STATUTES INVOLVED

Because the statutes involved in this case are lengthy, they are set forth in abbreviated form below and verbatim in Appendix C. These statutes are:

(1) 49 U.S.C. §317(a):

> "(a) Every common carrier by motor vehicle shall file with the Commission . . . tariffs showing all rates, fares, and charges for transportation . . . of . . . property in interstate . . . commerce . . . . [T]he Commission is authorized to reject any tariff filed with it which is not in consonance with this section and with such regulations. Any tariff so rejected by the Commission shall be void and its use shall be unlawful."

(2) 49 U.S.C. § 317(b):

> "(b) No common carrier by motor vehicle shall charge or demand or collect or receive a greater or less or different compensation for transportation or for any service in connection therewith . . . than the rates,

fares, and charges specified in the tariffs in effect at the time . . . ."

(3) 49 U.S.C. § 317(d):

"(d) No common carrier by motor vehicle . . . shall engage in the transportation of . . . property unless the rates, fares, and charges upon which the same are transported . . . have been filed and published in accordance with the provisions of this chapter."

V.

STATEMENT OF THE CASE

This is a diversity case. This action was originally commenced by respondent, Maas Transport, Inc. hereinafter sometimes called "Maas", in the District Court, Fifth Judicial District, State of North Dakota, and was removed by petitioner, Ets-Hokin & Galvan, Inc., hereinafter sometimes called "Ets-Hokin", to the United States District Court for the District of North Dakota, Northwestern Division. The action was removed on the basis of diversity of citizenship and amount in controversy. Maas is a North Dakota corporation having its principal place of business in the State of North Dakota. Ets-Hokin is a California corporation having its principal place of business in the State of California.

Ets-Hokin is engaged in the contracting and engineering business. Maas is a common carrier by motor vehicle.

In May, 1962, Ets-Hokin contracted with the United States Air Force to install about 1,500 miles of buried cable in the Minot, North Dakota, missile complex. The reels of cable were shipped in interstate commerce by rail from Bonham, Texas, to certain Soo Line railheads near Minot, North Dakota. Pursuant to an agreement between Ets-Hokin and Maas, the reels were picked up by Maas at the railheads and transported to specifically designated

field locations intermediate to the missile site control centers.

On August 6, 1962, Maas filed with the Interstate Commerce Commission, hereinafter sometimes called "ICC", an application for permanent authority to operate as a common carrier, by motor vehicle, over irregular routes, to transport the cable in question (1) between the Soo Line railheads on the one hand and intercontinental ballistic missile launching sites on the other and (2) between the various missile sites. On August 31, 1962, while Maas' application was still pending, before any authority to operate had been obtained and before any tariff rate had been filed with the ICC, Maas commenced hauling the cable. Maas continued to haul the cable without authority or applicable tariffs on file with the ICC until its services were terminated by Ets-Hokin on March 5, 1963.[1]

Maas brought this suit to recover freight charges for the cargo so hauled in violation of the Interstate Commerce Act.[2]

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1. The Court of Appeals observed in footnote 3 of its opinion that a temporary interstate tariff became effective on November 18, 1962, but did not consider the question of whether that temporary tariff covered the hauling in question. It did not. The Interstate Commerce Commission specifically so held in a related case, *Maas Transport Inc., Extension-North Dakota Missile Sites,* 92 M.C.C. 581 (Sept. 17, 1963) and pointed out that the temporary authority and tariff covered only hauls from the railheads to missile sites, while the hauling in question was from railheads to points *intermediate* to the missile sites. The Court of Appeals also noted that "[t]he trial court found that Maas did not, 'at the critical time, have or rely on any applicable interstate tariff.'"

2. B. L. Lawrence, doing business as Lawrence Transport, intervened as a party plaintiff. Maas and Lawrence stipulated that any judgment rendered could be rendered in their favor jointly.

The District Court found that the parties had entered into an express oral contract providing for compensation in accordance with hourly rates set forth in Maas' inapplicable *intrastate* tariff on file with the Public Service Commission of North Dakota. The District Court further found that the shipments were in interstate commerce and that respondent did not have or rely on any applicable *interstate* tariff, but concluded that the contract was valid and enforceable notwithstanding the violation of the Act. The Court entered judgment for the full amount prayed for in the complaint, $90,990.75, together with interest.

An appeal was taken by Ets-Hokin to the United States Court of Appeals for the Eighth Circuit. Ets-Hokin argued, *inter alia,* that the oral contract of carriage was illegal as being in violation of Part II of the Interstate Commerce Act, Motor Carriers, 49 U.S.C. 301 et seq., because no tariffs had been filed. The Court of Appeals responded by stating:

> "In the instant case, Maas was in violation of the Motor Carrier provisions of the Interstate Commerce Act when it transported cable under its contract with Ets-Hokin and was subject to penalties for such violations. The cable transportation contract itself, however, would be void, illegal or unenforceable only if Congress, in passing the Motor Carrier provisions of the Interstate Commerce Act, intended that contracts resulting in violations of that portion of the Act be illegal and void. A review of the statutory provisions involved herein reveals no congressional intention to make contracts in violation thereof void or illegal. (footnote omitted) The contract between Ets-Hokin and Maas was valid and enforceable."

VI.

REASONS FOR GRANTING THE WRIT

1. The Decision of the Eighth Circuit Upholding the Enforceability of a Contract Made in Violation of the Interstate Commerce Act Is in Conflict With Principles of Law Announced by This Court.

A. CONTRACTS IN VIOLATION OF THE INTERSTATE COMMERCE ACT.

While there are no cases decided by this Court involving the validity of a contract to transport goods in interstate commerce where, as here, the carrier filed no tariff rate with the ICC whatsoever, several closely analagous cases decided by this Court brand as illegal and unenforceable deviations from tariff rates on file with the ICC.

In *Atchison, T. & S.F. Ry. v. Robinson,* 233 U.S. 173 (1914), an oral agreement which did not conform to the railroad's filed tariffs was held illegal and unenforceable. The Court stated at 233 U.S. 181:

> "To give to the oral agreement upon which the suit was brought, the prevailing effect allowed in this case by the charge in the trial court, . . . would be to allow a special contract to have binding force and effect though made in violation of the filed schedules which were to be equally observed by the shipper and carrier. If oral agreements of this character can be sustained, then the door is open to all manner of special contracts, departing from the schedules and rates filed with the Commission. . . . To maintain the supremacy of such oral agreements would defeat the primary purposes of the Interstate Commerce Act, so often affirmed in the decisions of this Court, which are to require equal treatment of all shippers and the charging of but one rate to all and that the one filed as required by the Act."

In *Chicago & A. R.R. v. Kirby,* 225 U.S. 155 (1911), the railroad had entered into a contract at rates different from those published. This Court held that the contract

was unenforceable because to allow the shipper to recover thereunder would in effect give him a preferential rate, in violation of the Act. The Court relied on Section 6(7) of the Act, applicable to railroad carriers, which is identical to Section 317(b) of the Act, applicable to motor carriers.

In *Pittsburgh, C., C. & St.L. Ry. v. Fink,* 250 U.S. 578 (1919), the suit was to recover a freight undercharge resulting from an agreed-upon rate inadvertently different from the one filed with the ICC. This Court held the contract to be unlawful and unenforceable, even though there was no attempt to evade the Act.

B. ILLEGAL CONTRACTS IN GENERAL

The most recent opinion by this Court involving the enforceability of contracts in violation of federal statutes is *United States v. Mississippi Valley Generating Co.,* 364 U.S. 520 (1961), wherein it was held that a contract in violation of 18 U.S.C. § 434 (conflict of interest) is unenforceable. At page 563 the Court held:

> "Having determined that Wenzell's activities constituted a violation of Section 434, we must next consider whether Wenzell's illegal conduct renders the contract unenforceable. It is true that Section 434 does not specifically provide for the invalidation of contracts which are made in violation of the statutory prohibition. However, that fact is not determinative of the question, for a statute frequently implies that a contract is not to be enforced when it arises out of circumstances that would lead enforcement to offend the essential purpose of the enactment. Therefore, the inquiry must be whether the sanction of nonenforcement is consistent with and essential to effectuating the public policy embodied in section 434. If the Government's sole remedy in a case such as that now before us is merely a criminal prosecution against its agent, as the respondent suggests, then the public will be forced

> to bear the burden of complying with the very sort of contract which the statute sought to prevent. Were we to decree the enforcement of such a contract, we would be affirmatively sanctioning the type of infected bargain which the statute outlaws and we would be depriving the public of the protection which Congress has conferred."

The reasoning of the Court in the above case applies equally to the present situation. If, as the Eighth Circuit suggests, the sole sanction for the illegal contract is that Maas would be "subject to penalties for such violation", then shippers like Ets-Hokin would be "forced to bear the burden of complying with the very sort of contract which the statute sought to prevent."

See also *Yankton Sioux Tribe v. United States*, 272 U.S. 351 (1926); *Miller v. Ammon*, 145 U.S. 421 (1892); and *Gibbs v. Consolidated Gas Co.*, 130 U.S. 396 (1889).

2. The Decision of the Eighth Circuit That a Contract Made in Violation of the Act Is Nevertheless Valid and Enforceable Is in Conflict With General Principles of Law Enunciated by Other Circuit Courts.

There are no Court of Appeals cases dealing with the question of the validity of a contract to transport goods in interstate commerce where the carrier has no rate on file with the ICC. There are, however, several cases in other Circuits which hold that a contract made in violation of the Act is illegal and void. *Interstate Commerce Commission v. North Pier Terminal Co.*, 164 F.2d 640 (7th Cir. 1947), cert. den. 334 U.S. 815 (1948); *Interstate Commerce Commission v. Keeshin Motor Express Co.*, 134 F.2d 228 (7th Cir. 1943); *Central R.R. of New Jersey v. United States Pipe Line Co.*, 1 F.2d 866 (3rd Cir. 1924).

In *Central R.R. of New Jersey v. United States Pipe Line Co., supra*, the trial court found that:

". . . '[T]he contract sued upon is illegal and void because it violates the Interstate Commerce Act . . . in that the agreed toll for which the oil was to be transported was lower than the tariff rates posted by the plaintiff.'" (1 F.2d at 868.)

The Circuit Court of Appeals, finding noncompliance with the Act, affirmed at p. 868:

"The purpose of the Act in requiring tariffs containing the rate of carriers to be filed was to secure uniformity, to secure the same treatment to all shippers alike by requiring them to pay one rate as established, published and posted. To do this requires inflexibility in the enforcement of the act. (citations) The contract rates differing from the published rates filed with the Interstate Commerce Commission, rendered the contract *illegal* and *void.* (citations)" [emphasis added]

and at p. 870:

"The plaintiff in the case at bar based his suit upon the contract. The right to recovery depends upon its validity, and its validity in turn depends upon compliance by the carrier with the provisions of the Interstate Commerce Act. . . . It is public policy and the law that all shippers be treated alike and pay the same rates. Therefore this court cannot sanction the transportation of oil by the plaintiff for the defendant at illegal rates."

3. The Decision of the Eighth Circuit Is in Conflict with the Decisions of the Highest State Courts of Several States on the Broad Federal Question Here Involved.

The state courts have consistently held that acts or contracts in violation of the Interstate Commerce Act are unlawful and void.

Bankers & Shippers Ins. Co. v. Blackwell, 51 So.2d 498 (Ala. 1951) concerned a suit by an interstate motor common

carrier for recovery under an insurance policy for damage to goods while in transit. The carrier was engaged in interstate commerce and had not secured a permit or certificate; the court held that the hauling was illegal and in violation of the Interstate Commerce Act constituting criminal offenses in violation of the laws of the United States, and thus the contract was illegal and unenforceable and null and void.

In *St. Louis-S.F. Ry v. J. W. Meyers Comm'n Co.*, 208 Ark. 1032, 185 S.W.2d 288 (1945), the shipper attempted to violate the terms of the railroad tariff by proving an express oral contract with the railroad covering goods shipped in interstate commerce. The court held that any special contract not authorized by the Act and not available to all shippers alike is void.

Shirks Motor Exp. Corp. v. Forster Transfer and Rigging Co., 214 Md. 18, 133 A.2d 59 (1957) likewise held a contract in violation of the Act void. Other cases to the same effect are *Thompson v. Richards*, 158 Kan. 178, 146 P.2d 359 (1944); *Bass v. Chicago Duluth & Georgian Bay Transit Co.*, 399 Ill. App. 246, 89 N.E.2d 430 (1949); *Brandon v. Lichty*, 133 Fla. 520, 182 So. 897 (1938), and *Pennsylvania R.R. v. Cameron*, 280 Pa. 458, 124 A. 638 (1924).

4. The Exact Question Here Involved, Not Yet Ruled Upon by This Court, Is of Vital Interest to the Effective Regulation of Interstate Commerce and Should Be Decided by This Court.

This Court has ruled that a contract for rates deviating from a filed tariff is illegal and unenforceable. The question here presented for review is whether a contract is also illegal and unenforceable where no rates at all have been filed. Petitioner submits that this question must be resolved for the following reasons:

(a) The Eighth Circuit's opinion has resulted in the anomalous situation wherein a carrier who completely ignores the Interstate Commerce Act is in a better position than a carrier who merely deviates from its tariffs. It is submitted that such a result is in direct conflict with the National Transportation Policy, printed herein as Appendix D, which underlies the Act in that this result would allow the carrier to engage in unjust discriminations, undue preference and advantages, and unfair and destructive business practices.

(b) The decision of the Eighth Circuit destroys the effectiveness of the Interstate Commerce Act in regulating interstate motor carriers. If the Eighth Circuit is correct in upholding the validity of a contract made in direct violation of 49 U.S.C. § 317(d), there would be no effective sanctions to induce carriers to submit to the regulations of the ICC. The decision below would encourage unscrupulous motor carriers to violate the Act, thereby placing a heavy burden on the ICC to prosecute all offenders.

VII.
CONCLUSION

For the reasons hereinabove stated petitioner respectfully submits that this writ should be granted.

Dated: San Francisco, California, September 28, 1967.

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(Appendices Follow)

Appendix A

United States Court of Appeals
For the Eighth Circuit

No. 18,628

Appeal from the United States District Court for the District of North Dakota.

Ets-Hokin & Galvan, Inc.,
Appellant,

vs.

Maas Transport, Inc., and B. L. Lawrence, d/b/a Lawrence Transportation,
Appellees.

[July 11, 1967.]

Before MEHAFFY and GIBSON, Circuit Judges and STEPHENSON, District Judge.

STEPHENSON, District Judge.

This action was instituted by Maas Transport, Inc. (Maas) against Ets-Hokin & Galvan, Inc. (Ets-Hokin) for transportation charges of $90,990.75 arising from services rendered by Maas from August 31, 1962 to March 5, 1963. B. L. Lawrence, d/b/a Lawrence Transportation (Lawrence) subsequently intervened in the lawsuit as a party plaintiff and joined Maas in seeking compensation of $90,990.75.[1] Jurisdiction exists by diversity of citizenship and involvement of the requisite jurisdictional amount. 28 U.S.C. § 1332. After a non-jury trial in the district

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1. Maas and Lawrence stipulated in the trial court that any judgment to be entered in this matter may and should be entered in their favor jointly.

court, pursuant to Federal Rule of Civil Procedure 52, judgment was entered in favor of Maas and Lawrence for the full amount sought.

During May 1962, Ets-Hokin contracted with the Air Force for the installation of approximately 1,500 miles of buried cable for the missile complex near Minot, North Dakota. This cable was manufactured in Bonham, Texas and then shipped to certain railheads near Minot. After obtaining the installation contract, Ets-Hokin entered into negotiations with various carriers for the purpose of obtaining an agreement concerning, primarily, the transportation of the cable from the railheads to the point of installation. Maas was one of the carriers involved in negotiations with Ets-Hokin at this time. Maas was ultimately awarded the cable transportation and, on August 31, 1962, the cable hauling was commenced. Maas continued to transport cable until March 5, 1963 when its services were terminated. The controversy herein arises out of a dispute as to the compensation to be awarded Maas and Lawrence for services performed during this period.[2] Maas contends that the transportation services were performed under an express oral contract providing for compensation in accordance with the hourly rate set forth in its intrastate tariff on file with the North Dakota Public Service Commission. On the other hand, Ets-Hokin denies the existence of such an express oral contract and further contends that even if such a contract existed, it would be illegal and unenforceable.

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2. There is a dispute regarding the business relationship of Maas and Lawrence. Ets-Hokin contends that the two companies were involved in a joint venture while both Maas and Lawrence urge that they had merely entered into a leasing arrangement. There is ample evidence in the record to support the trial court's conclusion that "the Intervening plaintiff was a common carrier, who had leased his equipment to the plaintiff for use in the installation of the communications system."

The trial court herein found that during the negotiations between Maas and Ets-Hokin regarding transportation services, the former submitted an oral offer to perform the desired transportation services at an hourly rate. The court further found that Ets-Hokin accepted this offer when it instructed Maas to commence hauling operations—thereby finding that an express oral contract based on an hourly rate of compensation existed between Maas and Ets-Hokin. In considering a trial court's factual determinations, due regard must be given to the opportunity of the trial court to evaluate the credibility of the witnesses. Such factual determinations should not be set aside on appeal unless the Court of Appeals determines that they are clearly erroneous. *General American Life Ins. Co. v. Tarbaugh,* 360 F.2d 562 (8th Cir., 1966). After reviewing the record in this matter, the Court finds that there is substantial evidence supporting the trial court's determination that an express oral contract for transportation services existed between Maas and Ets-Hokin and that compensation was to be based on the hourly rate set forth in Maas' North Dakota intrastate tariff. The trial court's determination on this point is affirmed.

Ets-Hokin further contends that even if an express oral contract based on an hourly rate existed, it was illegal and thus unenforceable. Ets-Hokin premises its contention upon the fact that a three judge federal court previously rendered a decision that the truck movement of cable manufactured in Texas from the railheads located in North Dakota to the installation point near Minot, North Dakota was interstate commerce since the movement was a portion of the transportation of the cable from Texas to its ultimate destination. *Great Northern Ry. v. Thompson,* 222 F.Supp. 573 (D.N.D. 1963). It is thus now apparent that Maas was engaged in interstate commerce in hauling

the cable from the railheads to installation points.[3] In this connection, the trial court found that Maas did not, "at the critical time, have or rely on any applicable interstate tariff." This finding is not disputed by Maas. It is thus obvious that in hauling the cable pursuant to its agreement with Ets-Hokin, Maas was in violation of federal laws governing interstate commerce. See 49 U.S.C. 301 et seq. Ets-Hokin urges that this violation renders any express oral contract it may have had with Maas illegal and, thus unenforceable. We disagree.

A contract in violation of a statutory provision generally is void or illegal only if the legislative body enacting the statute evidences an intention that such contracts be considered void or illegal. See, *e.g.*, *McCullough Transfer Co. v. Virginia Sur. Co.*, 213 F.2d 440 (6th Cir. 1954); *Macco Const. Co. v. Farr*, 137 F.2d 52 (9th Cir. 1943); *Guffey-Gillespie Oil Co. v. Wright*, 281 Fed. 787 (8th Cir. 1922); *Talco Capital Corp. v. Canaveral Int'l. Corp.*, 225 F.Supp. 1007 (S.D. Fla. 1964); 17 C.J.S. § 202 at 1007 (1963); otherwise, even though the parties to a contract may be subject to a statutory penalty as the result of performing a contract, the contract itself remains in full force and effect. In the instant case, Maas was in violation of the Motor Carrier provisions of the Interstate Commerce

3. The decision finding the cable transportation to be of an interstate character was not rendered until after Maas ceased hauling cable on this particular operation. There is evidence in the record indicating that at the time Maas was conducting the hauling operation, the parties to the agreement believed that the hauling operation was of an intrastate character. Contrary to the contract under consideration in *Empire Box Corp. v. Willard Sulzberger Motor Co.*, 104 F.Supp. 762, 765 (D.N.J. 1952) (cited by Ets-Hokin), the contract between Maas and Ets-Hokin was clearly not designed to evade the motor carrier provisions of the Interstate Commerce Act. It should also be noted that Maas later filed a tariff, identical to the intrastate tariff, with the Interstate Commerce Commission. This interstate tariff became effective November 8, 1962 which was during the progress of the work under the contract.

Act when it transported cable under its contract with Ets-Hokin and was subject to penalties for such violations. The cable transportation contract itself, however, would be void, illegal or unenforceable only if Congress, in passing the Motor Carrier provisions of the Interstate Commerce Act, intended that contracts resulting in violations of that portion of the Act be illegal and void. A review of the statutory provisions involved herein reveals no congressional intention to make contracts in violation thereof void or illegal.[4] The contract between Ets-Hokin and Maas was valid and enforceable.

Appellant further contends that:

> "The court erred in the following conclusion of law (R. 491): 'that by the terms of the contract, plaintiff's services were subject to termination by defendant at any time upon notice, and that any inefficiencies which might have existed in the plaintiff's performance under the contract were waived by knowingly acquiescing in the continued performance by plaintiff' (This assigned

4. The congressional policy with respect to the Motor Carriers Act is set forth in the historical note preceding 49 U.S.C. § 301. The policy is stated in the following manner: "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act [chapters 1, 8, 12, 13 and 19 of this title], so administered as to recognize and preserve the inherent advantages of each: to promote safe, adequate, economical and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing coordinating and preserving a national transportation system by water, highway, and rail as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

error covers like errors in conclusions of law 3-6, R. 492.)[5]" Brief for appellant p. 55.

This being a diversity action, the law of North Dakota governs the estoppel issue. *James Talcott, Inc. v. Associates Discount Corporation,* 302 F.2d 443, 446 (8th Cir. 1962); *Kelly Tire Service, Inc. v. Kelly-Springfield Tire Co.,* 338 F.2d 248 (8th Cir. 1964). In *Rath v. Armour and Company,* 136 N.W.2d 142, 148 (N.D. 1965) the Supreme Court of North Dakota reviewed the doctrine of estoppel as follows:

> Section 31-11-06, N.D.C.C., provides that: "When a party, by his own declaration, act or omission, intentionally and deliberately has led another to believe a particular thing true and to act upon such belief, he shall not be permitted to falsify it in any litigation arising out of such declaration, act, or omission." The effect of this section is to enact into substantive law the equitable principle of estoppel and render it cognizable in both law and equity. *Neset v. Rudman,* N.D., 74 N.W.2d 826. In *Werner v. Werner,* 74 N.D. 565, 23 N.W.2d 757, this court said: "An essential element of equitable estoppel is a representation which may consist of words, acts or silence, believed and relied upon by the party claiming the benefit of the estoppel which induced him to act or refrain from acting, to his prejudice." *Rath et al. v. Armour and Company,* N.D., 136 N.W.2d 142, 148. Also see: *Kunick, et al. v. Trout,* N.D., 85 N.W.2d 438, 448.

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5. Conclusions of law 3-6, R. 492 (Record p. 492) are as follows:
   3. That the Plaintiff fully performed its obligations pursuant to the terms of the oral contract entered into between the Plaintiff and Defendant in a satisfactory and workmanlike manner.
   4. That the Defendant's acts, representations, and omissions (including the acceptance and solicitation of Plaintiff's services, and silence as to complaints, now made and tacit and expressed approval as to some of the actions of Plaintiff which constitute the grounds of such alleged complaints) successfully secured to it the continuous services of Plaintiff, which services were essential to the performance and completion of Defendant's own obligations under its prime contract, during all

No useful purpose would be served by setting out herein the record which supports the conclusions of the trial court. Suffice to say they are amply supported by the evidence and the law applicable thereto.

Finally, Ets-Hokin urges that the trial court erred in awarding Maas interest from and after the invoice date. A North Dakota statute provides:

> Every person who is entitled to recover damages certain or capable of being made certain by calculation, the right to recover which is vested in him upon a particular day, also is entitled to recover interest thereon from that day, except for such time as the debtor is prevented by law or by the act of the creditor from paying the debt. N.D. Cent. Code § 32-03-04 (1960).

See also, *Jacobson v. Mutual Benefit Health & Accident Ass'n*, 70 N.D. 566, 296 N.W. 545 (1941).

The trial court having found that Maas and Ets-Hokin had entered into an express oral contract and that Maas had performed its obligations pursuant thereto, it was just and proper that interest be awarded from the invoice date.

Upon review of the entire record, the findings, conclusions and judgment of the trial court are affirmed.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

---

of which time the plaintiff believed, and had reasonable cause to believe, that such services (performed in good faith by Plaintiff) were wholly satisfactory and were being performed and furnished at an agreed price—which understanding and belief of the Planitiff was known to Defendant, and was due to the actions, representations, and omissions aforesaid on the part of the Defendant, which were relied upon by Plaintiff.

5. That it would be unconscionable to permit Defendant to maintain a position inconsistent with the terms and conditions of the oral contract, the performance of which is acquiesced in and the Defendant is and should be estopped from so doing.

6. That the Defendant's position is devoid of equity.

Appendix B

Memorandum and Order—District Court.

[Title of Court and Cause Omitted]

[Filed in U. S. District Court on Aug. 8, 1966.]

Following trial of the issues without a jury, and the submission of after trial briefs, the Court finds and makes its order as follows:

This diversity action is one for money damages as compensation for motor carrier transportation services rendered by the Plaintiff between September 1, 1962, and March 5, 1963, inclusive. The Intervening Plaintiff is a citizen of North Dakota; jurisdiction is established.

During the pertinent times here involved Defendant was the prime contractor for the installation of a communication system for Minuteman Wing No. 3, Minot, North Dakota, and Plaintiff was a common carrier, licensed as such by the North Dakota Public Service Commission, with a tariff filed with said Commission as required by law. The services performed by Plaintiff, and for which compensation is sought, consisted of transporting full and empty cable reels by truck between various railheads and designated sites within the missile complex. Cable was transported from Bonham, Texas, by rail to various designated points on the Soo Line Railway for further ex-rail transportation by truck to locations intermediate to the missile and control center sites. The cable reel was placed by said motor carrier at designated locations, and the return movement of empty cable reel began in the field locations and thence back to the railhead for trans-shipment by rail to Bonham, Texas.

Defendant admits that it owes one or both of the Plaintiffs compensation for the services performed, but denies the correctness of the amount alleged—$90,990.75. Since liability is conceded, the sole and ultimate issue for de-

termination is the amount to which either or both of the Plaintiffs are entitled.

Defendant contends that the legal relationship of the Plaintiff and Intervening Plaintiff was in the nature of a joint venture, and that such joint venture did not have, at the critical time, an interstate tariff applicable and effective regarding these cable shipments, and that under those circumstances the rights of the respective parties are governed by common law principles of contract. United States v. Maxwell C. Garner, 313 I. C. C. 139. Plaintiff argues that the relationship between it and the Intervening Plaintiff was that of lessor-lessee, involving certain equipment used in the performance of its services. Notwithstanding these divergent positions, it clearly appears that the shipments of cable reel here involved were interstate in character (see Great Northern Railway Company v. Thompson et al., 222 F. Supp. 573) and that the Plaintiff did not, at the critical time, have or rely on any applicable interstate tariff (Tr. 147-8). Furthermore, Plaintiff and Intervening Plaintiff have stipulated and agreed that the judgment to be herein entered may and should be entered in their favor jointly. Hence, in the Court's view, the Defendant will be amply protected.

Concluding the negotiations (between Plaintiff, represented by its President, Mr. Maas, and the Defendant, represented by Mr. Frager, its Project Manager) concerning the transportation of the cable reels, and prior to the commencement of the services performed by Plaintiff, an oral contract was entered into. In effect, during the pre-contract negotiations Mr. Maas had submitted an oral "bid" or "offer" to Mr. Frager, clearly stating the terms whereby Plaintiff would furnish the men and equipment and transportation services desired by De-

fendant, which offer was fully understood by both parties, and which was unconditionally, knowingly and intentionally, accepted by the Defendant by Mr. Frager's directing and ordering Plaintiff, on August 30th or 31st, to unload cars at Voltaire, North Dakota, and get his equipment on the job. Said contract thereafter remained in full force and effect until terminated by notice in accordance with one of the provisions thereof. In substance, and by the express terms of the oral contract, Plaintiff agreed to perform the necessary transportation services (including the furnishing of the necessary men and equipment required) when notified of the need therefor by the Defendant. It was further agreed, by the express terms of the oral contract, that the consideration or compensation to be received by Plaintiff for the performance of such services was to be in accordance with the hourly rates set forth in Plaintiff's intrastate tariff on file with the North Dakota Public Service Commission; and, further, that said contract and Plaintiff's services to be performed thereunder could be terminated by the Defendant, at any time, upon notice to the Plaintiff. The Court is satified that, while Plaintiff's intrastate tariff was not, per se, applicable, the rates therein scheduled were, by reference thereto, incorporated in the oral contract and therein agreed to be the amount or basis of compensation to be paid by Defendant for the services to be performed by Plaintiff under the contract. Therefore, thereby the intrastate tariff was made the basis upon which payment for Plaintiff's services was to be made.

While Defendant denies that the terms of the oral contract required that Plaintiff be paid on an hourly basis, it concedes that such was one of the prime topics of conversation during the preliminary negotiations, but contends that thereafter a firm price (on a ton basis)

was reached and agreed upon, which price was arrived at by estimating from the hourly schedule contained in Plaintiff's intrastate tariff. This issue is resolved in favor of Plaintiff.

At the time of the pre-contract negotiations, it is clear that the prime concern of Mr. Frager, as Project Manager, insofar as the matters here at issue are concerned, was to make arrangements for the transportation of the cable reels by dependable and responsible carrier. (Tr. 373). At that time it was apparent to any experienced carrier (and also to Defendant) that there were many variables and uncertainties which would affect to substantial degree the reasonable value of the required transportation services. Defendant could not, and did not, purport to guarantee that the cable reels would arrive in proper sequence. The extent to which the ultimate contract price would be affected by delay in delivery of the cable reels, and/or delivery out of sequence, is apparent (Tr. 50, and pp. 308-10). That such fact was well recognized by Defendant is evidenced by the character and amount of the claim subsequently submitted by Defendant to the Government (Tr. 306-9; Pl. Exh. 133). It was apparent to all parties that the required services would likely be performed during those months which were normally considered the winter, sub-zero season of the year in North Dakota. The effect of such climatic conditions upon the operation of equipment, road restrictions and travel (both upon the roads and highways and between delivery sites) was within the personal knowledge of Mr. Maas. Whether Defendant promptly and efficiently performed its obligations to clear the rights of way and stake and blade travel areas from the rights of way to the delivery sites, would affect the ease and expedition with which Plaintiff could perform its contract obligations.

It is undisputed that, prior to the subject contract, Plaintiff had performed a substantial amount of hauling on the Minot missile complex for other parties—including Bethlehem Steel Corporation and Peter Kiewit—and that for such services Plaintiff charged, and was paid, on the basis of an hourly rate based upon the intrastate tariff filed with the North Dakota Public Service Commission. It is undisputed, too, that Mr. Maas informed Mr. Frager of such hauling and charges during the negotiations between the parties hereto (Tr. 20-3 and 78-9).

Mr. Maas testified that throughout the negotiations between himself and Mr. Frager the only basis upon which he would agree to perform was on an hourly basis, and that any discussion as to tonnage rates was had only in an attempt to arrive at some estimate of a tonnage rate, based, however, on the hourly rate (Tr. 82, 230-1). Such arrangement is consistent with Plaintiff's other contracts heretofore mentioned, and is substantiated by the testimony of Mr. Lawrence (Tr. 264) and Mr. Lawson (Tr. 531). Additionally, it is wholly consistent with Plaintiff's subsequent conduct and actions. (See, for example, Pl. Exh. 128, and Tr. 47 and 48, and invoices submitted by Plaintiff and received by Defendant.)

Defendant contends that an agreement or contract for carrier services such as those performed by Plaintiff herein, on an hourly rate, is so unreasonable—in view of the claimed fact that it could have contracted with the Great Northern Railway on a fixed or tonnage rate—that it is virtually incredible. In this regard it is interesting to note the testimony of Defendant's witness Heimbach, an employee of the Great Northern Railway Company who had a vast amount of trucking experience. Great Northern, according to Mr. Heimbach's testimony, had an operation serving the missile complex in Montana, and had the con-

tract to install the cable for Defendant in the Montana complex. Also, according to that testimony, the Montana contract or business was competitive, and the rates therein were based on what is referred to as the "Henry Lambert Trucking Company, Inc., Motor Freight Tariff No. 1" (Tr. 496). That company was "actively soliciting Bethlehem Steel for their traffic and had handled Bethlehem Steel's traffic in the past . . .", Bethlehem Steel being the prime contractor on that whole missile complex (Tr. 497). Yet, it clearly appears that, prior to the formation of the contract here involved, Plaintiff was hauling for Bethlehem Steel on the Minot complex on an hourly rate (same basis as here contended by Plaintiff), which fact was known by Defendant at the very time it was being solicited for the subject contract by Great Northern representatives. Also, according to Mr. Heimbach's testimony (Tr. 522-3), the bid from Great Northern for the work performed by it after termination of the subject contract ". . . really wasn't a firm bid. It was a bid based upon the information furnished us . . .", and the "bid" was actually an "estimate" and, in fact, certain factors thereafter arose which eventually affected the actual billing.

The Court also notes the testimony of Mr. Hoffman, General Agent of the Great Northern Railway Company. It appears that this witness was actively soliciting the business covered by the subject contract and had conversations relative thereto with Mr. Frager in the summer of 1962 (June 29 and again on July 9), which conversations were ultimately reduced to telegrams to other Company officials (Tr. 471-4). The telegram summarizing the July 9 conversation (Def. Exh. HH-1, Tr. 473) contains the following: "Suggested that he talk with Ed Metcalf, Bethlehem Traffic Dept., Minot, for comparison of service,

equipment and costs, comparing Great Northern with Maas as this would give him a good idea as to how Maas' hourly rates compare to our tariff published cost which would be same bases they would be operating under." (Emphasis added.) This testimony and evidence was elicited from Defendant's own witness, and conclusively indicates that at the times he (Mr. Hoffman) talked with Mr. Frager, he was aware that Plaintiff's bid was based on an hourly rate, and that efforts were to be made to convince Mr. Frager that the Great Northern bid would result in lower cost to the Defendant for the services required. That Mr. Frager also had this knowledge and understanding during the conversations with Mr. Hoffman must be necessarily assumed, as that was of the very essence of the discussions.

The Court is satisfied that on August 31, 1962—the date on which Plaintiff commenced to perform under his contract—all prior negotiations had culminated in a binding oral contract; that there was a mutual meeting of the minds concerning the essential terms as heretofore stated; and that there was mutual assent to the terms of the contract, which terms were then fully and completely understood by the respective parties. Metzler et al. v. O. J. Barnes Co. (N. Dak.), 226 N. W. 501.

Defendant contends, and introduced evidence in an attempt to so establish, that in the performance of its services the Plaintiff used unnecessarily heavy equipment—for example, that a fork-lift could have been used in the unloading operating at the railhead, instead of truck number 70, which was an "outlaw," or that a lighter truck could have been used for the "ginning" operation—and that fewer men could have and should have been employed, and that in certain particulars the Plaintiff's performance

was inefficient and excessively costly. However, the Court is satisfied from all the evidence that, from time to time, Mr. Frager was informed of the method of Plaintiff's operation, and of the approximate cost to the Defendant, and that no objection thereto was made (Tr. 113-4). It is undisputed that Defendant was represented at the railheads by Mr. Sylvan Olsen, who was thoroughly familiar with the operations at those sites—including number of men and type and character and amount of equipment used—and that he made no complaint to Plaintiff. In fact, according to the uncontradicted testimony of Mr. Maas, Mr. Olsen expressed his opinion that no men employed in the unloading operation at the railroad sites could be spared or taken off the job (Tr. 119-20). The comments made by Mr. Miley (Defendant's representative) to Mr. Maas at a time Maas requested payment on the basis of a prior billing (Tr. 116-18) and at the time of a hearing on Plaintiff's application for permanent authority from the Interstate Commerce Commission (Tr. 121-27) indicate satisfaction with Plaintiff's services and negate Defendant's present contention. This evidence stands uncontradicted. It is clear that by one of the terms of the express oral contract, Plaintiff's services were subject to termination by the Defendant at any time, upon notice. The exercise of such contract provision by Defendant was simple—just informing Plaintiff to discontinue its services, as Defendant ultimately did. In the Court's opinion, based upon all the evidence, the present complaints of Defendant as to alleged inefficiencies on the part of Plaintiff in its performance under the contract were waived by knowingly acquiescing in the continued performance by Plaintiff.

It is the further opinion of this Court that the facts as disclosed by the evidence herein give rise to an equitable

estoppel. Since jurisdiction is based upon diversity of citizenship and the amount in controversy, North Dakota law governs in determining the legal issues presented.

> "Section 31-11-06, N.D.C.C, provides that: 'When a party, by his own declaration, act, or omission, intentionally and deliberately has led another to believe a particular thing true and to act upon such belief, he shall not be permitted to falsify it in any litigation arising out of such declaration, act, or omission.' The effect of this section is to enact into substantive law the equitable principle of estoppel and render it cognizable in both law and equity. Neset v. Rudman, N. D., 74 N. W. 2d 826. In Werner v. Werner, 74 N. D. 565, 23 N. W. 2d 757, this court said: 'An essential element of equitable estoppel is a representation which may consist of words, acts or silence, believed and relied upon by the party claiming the benefit of the estoppel which induced him to act or refrain from acting to his prejudice.'" Rath et al. v. Armour and Company, N. D., 136 N. W. 2d 142, 148. Also see: Kunick et al. v. Trout, N. D., 85 N. W. 2d 438, 448.

It appears that North Dakota law regarding the doctrine or principle of equitable estoppel is in accord with that generally recognized. For excellent discussions of such principle, see: James Talcott, Inc. v. Associates Discount Corporation et al., 8 Cir., 302 F. 2d 443; Kelly Tire Service, Inc., et al. v. Kelly-Springfield Tire Co., 8 Cir., 338 F. 2d 248; First National Bank of Portland v. Dudley, 9 Cir., 231 F. 2d 396; Albert v. Joralemon, 9 Cir., 271 F. 2d 236; and Fort Smith Tobacco & Candy Co. v. American Guarantee and Liability Insurance Company, D. C., W. D. Ark., 208 F. Supp. 244, 262-3.

The evidence is such that Defendant comes squarely within the provisions of Section 31-11-06, N. D. C. C., supra, and the interpretation placed thereon by the Supreme Court of North Dakota. It would be unconscionable to permit Defendant to reap the benefits of the defenses presented in this lawsuit—particularly in view of the rather unique fact that Plaintiff's services could have been terminated by the unilateral action of the Defendant at any time it desired to take such action. It is noted that, even at the time Plaintiff's services were terminated, there was no indication given by the Defendant that there was any dispute as to the basis upon which such services had been billed, and even in Defendant's reply to Plaintiff's last written request for payment there is no such expressed contention. (See Plaintiff's Exhs. 127 and 128, and Tr. 46-8.)

If, during performance of this contract by Plaintiff, the position of the Defendant was as it has been since the inception of the litigation based thereon, it would appear that only one inference or conclusion can be reasonably drawn from the whole evidence in the case—and that is, a deliberate attempt on the part of the Defendant to take advantage of Plaintiff, to the latter's financial detriment. Defendant's act, representations, and omissions (including the acceptance and solicitation of Plaintiff's services, and silence as to complaints now made and tacit and expressed approval as to some of the actions of Plaintiff which constitute the grounds of such alleged complaints) successfully secured to it the continuous services of Plaintiff, which services were essential to the performance and completion of Defendant's own obligations under its prime contract, during all of which time the Plaintiff believed, and had reasonable cause to believe, that such services (performed in good faith by Plaintiff) were wholly satisfactory and

were being performed and furnished at an agreed price—which understanding and belief of the Plaintiff was known to Defendant, and was due to the actions, representations, and omissions aforesaid on the part of the Defendant, and which were relied upon by Plaintiff. In the Court's opinion, Defendant's position is devoid of equity.

Plaintiff is entitled to judgment as prayed for in the complaint. Counsel therefor will prepare and submit appropriate findings of fact, conclusions of law, order for judgment and judgment, in conformity herewith.

It Is So Ordered.

Bismarck, North Dakota, this 8th day of August, 1966.

GEORGE S. REGISTER,
Chief Judge.

Appendix C

(1) Section 217(a) of the Interstate Commerce Act, Part II; Motor Carriers (Feb. 4, 1887, c. 104, Pt. II, § 217, as added Aug. 9, 1935, e. 498, 49 Stat. 560, and amended Sept. 18, 1940, c. 722, Title I § 22(e), 54 Stat. 925) 49 U.S.C.A § 317(a):

(a) Every common carrier by motor vehicle shall file with the Commission, and print, and keep open to public inspection, tariffs showing all the rates, fares, and charges for transportation, and all services in connection therewith, of passengers or property in interstate or foreign commerce between points on its own route and between points on its own route and points on the route of any other such carrier, or on the route of any common carrier by railroad and/or express and/or water, when a through route and joint rate shall have been established. Such rates, fares, and charges shall be stated in terms of lawful money of the United States. The tariffs required by this section shall be published, filed, and posted in such form and manner, and shall contain such information, as the Commission by regulations shall prescribe; and the Commission is authorized to reject any tariff filed with it which is not in consonance with this section and with such regulations. Any tariff so rejected by the Commission shall be void and its use shall be unlawful.

(2) Section 217(b) of the Interstate Commerce Act, Part II; Motor Carriers (Feb. 4, 1887, c. 104, Pt. II, § 217, as added Aug. 9, 1935, c. 498, 49 Stat. 560, and amended Sept. 18, 1940, c. 722, Title I § 22(e), 54 Stat. 925) 49 U.S.C.A. § 317(b):

(b) No common carrier by motor vehicle shall charge or demand or collect or receive a greater or less or different compensation for transportation or for any service in con-

nection therewith between the points enumerated in such tariff than the rates, fares, and charges specified in the tariffs in effect at the time; and no such carrier shall refund or remit in any manner or by any device, directly or indirectly, or through any agent or broker or otherwise, any portion of the rates, fares, or charges so specified, or extend to any person any privileges or facilities for transportation in interstate or foreign commerce except where such as are specified in its tariffs: *Provided,* That the provisions of sections 1(7) and 22 of this title shall apply to common carriers by motor vehicles subject to this chapter.

(3) Section 217(d) of the Interstate Commerce Act, Part II; Motor Carriers (Feb. 4, 1887, c. 104, Pt. II, § 217, as added Aug. 9, 1935, c. 498, 49 Stat. 560, and amended Sept. 18, 1940, c. 722, Title I § 22(e), 54 Stat. 925) 49 U.S.C.A. § 317(d):

(d) No common carrier by motor vehicle, unless otherwise provided by this chapter, shall engage in the transportation of passengers or property unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this chapter.

Appendix D

National Transportation Policy. Act Sept. 18, 1940, c. 722, Title I, § 1, 54 Stat. 899, amended the Interstate Commerce Act [chapters 1, 8, 12, 13 and 19 of this title], by inserting before Part I thereof (chapter 1 of this title) the following provision entitled "National Transportation Policy": "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act [chapters 1, 8, 12, 13 and 19 of this title], so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 662

ETS-HOKIN & GALVAN, INC., a Foreign Corporation,
Petitioner,

v.

MAAS TRANSPORT, INC., a North Dakota Corporation, and B. L. LAWRENCE, doing business as Lawrence Transportation, *Respondents.*

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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ETS-HOKIN & GALVAN, INC., a Foreign Corporation,
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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

OPINION BELOW

The opinion of the Court of Appeals is reported in 380 F.2d 258 (8th Cir. 1967). The unreported opinion of the District Court is reproduced in Petitioner's Brief as Appendix B.

JURISDICTION

The jurisdictional grounds are set forth in Petitioner's Brief.

QUESTIONS PRESENTED

1. When a contract is entered into for a carriage of goods on a haul asserted by a state regulatory agency to be an intrastate movement for rates prescribed in tariffs filed with the state regulatory body and when

tariffs providing identical rates are thereafter filed with Interstate Commerce Commission and subsequently after the services have been rendered, the movement is determined by a federal three-judge court to be interstate, may the carrier recover the contract price?

2. Does the prior course of conduct of the Petitioner during the performance of the contract for interstate carrier service and prior to this litigation estop it from raising the question of the invalidity of the contract?

3. Does the fact that the Petitioner made application to and received from the United States Air Force a large amount of money for cable delay and out-of-sequence cable alleging in support thereof the non-negotiability of the Respondents' claim, render the Petitioner's position here devoid of equity?

4. Is the Petitioner prevented from raising the question of invalidity of the contract for the first time on appeal?

STATUTES INVOLVED

(1) *Section 216 (a) of the Interstate Commerce Act, Part II; Motor Carriers* (Feb. 4, 1887, c. 104, Pt. II, § 216, as added Aug. 9, 1935, c. 498, 49 Stat. 558, and amended June 29, 1938, c. 811, § 16, 52 Stat. 1240; Sept. 18, 1940, c. 722, Title I, § 22 (b-d), 54 Stat. 924; Aug. 24, 1962, Pub. L. 87-595, § 1, 76 Stat. 397.) 49 U.S.C.A. § 316 (a):

(a) It shall be the duty of every common carrier of passengers by motor vehicle to establish reasonable through routes with other such common carriers and

to provide safe and adequate service, equipment, and facilities for the transportation of passengers in interstate or foreign commerce; to establish, observe, and enforce just and reasonable individual and joint rates, fares, and charges, and just and reasonable regulations and practices relating thereto, and to the issuance, form, and substance of tickets, the carrying of personal, sample, and excess baggage, the facilities for transportation, and all other matters, relating to or connnected with the transportation of passengers in interstate or foreign commerce; and in case of such joint rates, fares, and charges, to establish just, reasonable, and equitable divisions thereof as between the carriers participating therein which shall not unduly prefer or prejudice any of such participating carriers.

(2) *Section 216 (b) of the Interstate Commerce Act, Part II; Motor Carriers* (Feb. 4, 1887, c. 104, Pt. II, § 216, as added Aug. 9, 1935, c. 498, 49 Stat. 558, and amended June 29, 1938, c. 811, § 16, 52 Stat. 1240; Sept. 18, 1940, c. 722, Title I, § 22 (b-d), 54 Stat. 924; Aug. 24, 1962, Pub. L. 87-595, § 1, 76 Stat. 397.) 49 U.S.C.A. § 316(b):

(b) It shall be the duty of every common carrier of property by motor vehicle to provide safe and adequate service, equipment, and facilities for the transportation of property in interstate or foreign commerce; to establish, observe, and enforce just and reasonable rates, charges, and classifications, just and reasonable regulations and practices relating thereto and to the manner and method of presenting, marking, packing, and delivering property for transportation, facilities for transportation, and all other matters relating to or connected with the transportation of property in interstate or foreign commerce.

STATEMENT OF CASE

The Respondent wishes to add to the Statement of Case as presented by the Petitioner, the following facts:

In April of 1963, the Petitioner filed with the United States Air Force an application for additional compensation for hauling out-of-sequence cable and cable delay. In its application, the Petitioner stated that the incurred costs due to out-of-sequence cable and cable delay were subject to carrier rates established by governmental agencies and were not subject to negotiation between contractor and carrier (P. Ex. 133, E. 225-245, R. 275; P. Ex. 141, E. 254, R. 462). Based upon this application, the United States Air Force allowed additional compensation to the Petitioner. (P. Ex. 147, E. 266, R. 462).

At the time of the commencement of the carrier haul in August of 1962, the Respondent, Maas Transport, Inc., had on file with the North Dakota Public Service Commission a tariff providing for rates on a weight basis (P. Ex. 2, R. 60-75, 59). Identical tariffs were subsequently filed with the Interstate Commerce Commission (P. Ex. 6, R. 97, 98). In May of 1963, the North Dakota Public Service Commission declared that the carrier services being rendered in the installation of the communication system on the Minot, North Dakota, missile complex were intrastate in character (P. Ex. 138, E-249, R. 396). Not until October 21, 1963, was the question of whether this was an interstate or intrastate haul decided by a three-judge Federal Court. See *Great Northern* v. *Thompson*, 222 F. Supp. 573 (D.N.D. 1963).

REASONS FOR DENYING THE WRIT

I.

A Contract Entered Into for a Carriage of Goods on a Haul Asserted by a State Regulatory Agency To Be an Intrastate Movement for Rates Prescribed in Tariffs Filed With the State Regulatory Body and When Tariffs Providing Identical Rates Are Thereafter Filed With the Interstate Commerce Commission and Subsequently After the Services Have Been Rendered, the Movement Is Determined by a Federal Three-Judge Court To Be Interstate, Is Enforceable by the Carrier.

In the case of *Harris* v. *Runnels,* 12 How. 79, 13 L. Ed. 901 (1851) this Court stated that prior to deciding whether a contract in violation of the terms of the statute was void, the Court would look to the legislative intent or purpose behind the statute. See also, *McCullough Transfer Co.* v. *Virginia Sur. Co.,* 213 F.2d 440 (6th Cir. 1954); *Macco Const. Co.* v. *Farr,* 137 F.2d 52 (9th Cir. 1943); *Guffey-Gillespie Oil Co.* v. *Wright,* 218 Fed. 787 (8th Cir. 1922); *Talco Capital Corp.* v. *Canaveral Int'l Corp.,* 225 F. Supp. 1007 (S.D. La. 1964), *affirmed,* 344 F.2d 962; Anno., 55 A.L.R. 2d 497.

It is respectfully submitted that in the interpretation of the provisions of the Part II of the Interstate Commerce Act entitled "Motor Carriers," 49 U.S.C. §§ 301 et seq., decisions of this Court and the "National Transportation Policy" must be considered.

In 1940, Congress amended the Interstate Commerce Act by inserting before Part I thereof the following provision entitled "National Transportation Policy":

> "It is hereby declared to be the National Transportation Policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act

> [chapters 1, 8, 12, 13 and 19 of this title], so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy." 54 Stat. 899 (1940), 49 U.S.C., hist. note preceding §§ 1,301.

This Court has stated that the requirement of the Interstate Commerce Act, that tariff rates filed with the Commission must be enforced, is to prevent rebates and preferential treatment. *Dayton C. & I. Co.* v. *Cincinnati N.D. & T. T. R. Co.,* 239 U.S. 446, (1915).

The Petitioner, Ets-Hokin & Galvan, Inc., has cited numerous decisions in its brief stating that contracts in violation of the Interstate Commerce Act are void. However, each of the cases cited by the Petitioner insofar as they have any application to this case are cases wherein the contract involved called for a tariff rate different from those on file with the Interstate Commerce Commission. In each case, discrimination or rebates were involved. This is not the case in the instant proceeding.

At the commencement of the carrier haul out of which this case arose, the Respondent, Maas Transport, Inc., had on file with the North Dakota Public Service Commission an intrastate tariff. Subsequently, the identical tariff was filed with the Interstate Commerce Commission and became effective on November 8, 1962. The contract here at issue was terminated unilaterally by the Petitioner in March of 1963. On May 3, 1963, the North Dakota Public Service Commission declared the haul to be intrastate in character. Not until October 21, 1963, was the question of whether this was an interstate or intrastate haul decided. See *Great Northern* v. *Thompson,* 222 F. Supp. 573 (D. N.D. 1963).

There is no question of discrimination or rebate involved here. The rates charged under terms of the oral contract were identical to the tariffs on file with the North Dakota Public Service Commission and subsequently filed with the Interstate Commerce Commission.

A carrier has a right to a fair return on his property or investment even though the rates or fares charged by such individual are subject to public regulation. This rule is necessary to avoid the confiscation of property without just compensation. *Pacific Gas & E. Co.* v. *City & County of San Francisco,* 265 U.S. 403 (1924); *Los Angeles Gas & Elect. Corp.* v. *Railroad Comm.,* 289 U.S. 287 (1933).

II.

The Prior Course of Conduct of the Petitioner During the Performance of the Contract for Interstate Carrier Service and Prior to This Litigation Estops It From Raising the Question of the Invalidity of the Contract.

> "That Defendant's acts, representations, and omissions (including the acceptance and solicitation of Plaintiff's services, and silence as to complaints, now made, and tacit and expressed approval as to some of the actions of Plaintiff which constitute the grounds of such alleged complaints) successfully secured to it the continuous services of Plaintiff, which services were essential to the performance and completion of Defendant's own obligations under its prime contract, during all of which time the Plaintiff believed and had reasonable cause to believe, that such services (performed in good faith by Plaintiff) were wholly satisfactory and were being performed and furnished at an agreed price—which understanding and belief of the Plaintiff was known to Defendant, and was due to the actions, representations, and omissions aforesaid on the part of the Defendant, and which were relied upon by Plaintiff." (Finding of Fact No. 15, R. 490). See also, Appendix B, Petitioner's Brief, 17-18.

The Finding of the trial court was affirmed by the Court of Appeals. See *Ets-Hokin & Galvan, Inc.* v. *Maas Transport, Inc. and B. L. Lawrence, d/b/a Lawrence Transportation,* 380 F.2d 258 (8th Cir. 1967).

In *Glus* v. *Brooklyn Eastern District Terminal,* 359 U.S. 231 (1959), the Respondent induced the Petitioner to delay suing by representing to the Petitioner that he had seven years in which to sue. In stating that the Respondent could not rely upon the three year federal statute of limitations, this Court, quoting

from *Insurance Co.* v. *Wilkinson,* 13 Wall. 222, 223, 20 L. Ed. 617, stated:

> "The principle is that where one party has by his representations or his conduct induced the other party to a transaction to give him an advantage which it would be against equity and good conscience for him to assert, he would not in a court of justice be permitted to avail himself of that advantage. And although the cases to which this principle is to be applied are not as well defined as could be wished, the general doctrine is well understood and is applied by courts of law as well as equity where the technical advantage thus obtained is set up and relied on to defeat the ends of justice or establish a dishonest claim." *Supra* 359 U.S. at 234.

III.

The Fact That the Petitioner Made Application To and Received From the United States Air Force a Large Amount of Money for Cable Delay and Out-of-Sequence Cable Alleging in Support Thereof the Non-Negotiability of the Respondents' Claim, Rendered the Petitioner's Position Devoid of Equity.

In April of 1963, the Petitioner filed with the United States Air Force an application for additional compensation for hauling out-of-sequence cable and cable delay. In its application, the Petitioner stated that the incurred costs due to out-of-sequence cable and cable delay were subject to carrier rates established by governmental agencies and were not subject to negotiation between contractor and carrier. Based upon this application, the United States Air Force allowed additional compensation to the Petitioner.

The trial court found that:

> "The Defendant's position is devoid of equity." (Finding of Fact No. 16, R. 490.)

This finding was affirmed by the Court of Appeals. See *Ets-Hokin & Galvan, Inc.* v. *Maas Transport, Inc. and B. L. Lawrence, d/b/a Lawrence Transportation, supra.*

IV.

The Petitioner Is Prevented From Raising the Question of Invalidity of the Contract for the First Time on Appeal.

The Respondents take the position that Petitioner raised the issue of illegal contract for the first time on appeal. It agreed that there is an amount due and owing to the Respondents, but alleged that the amount claimed by the Complaint was grossly overstated. (Para. 3, Second Amended Answer to Plaintiff's Complaint, R. 10).

Illegality of the contract was not an issue raised by the pleadings. It was not an issue before the trial court. Therefore, it was an improper argument before the Court of Appeals. *Walters* v. *City of St. Louis, Missouri,* 347 U.S. 231 (1954).

The only issue raised by the pleadings and the only issue tried was the amount owed by Petitioner to the Respondents. It is submitted that this was the only proper issue on appeal.

CONCLUSIONS

In conclusion, it is the Respondents' contention that:

1. The oral contract out of which this case arose is in conformity with the policy of the Interstate Commerce Act and with decisions of this Court. It is sub-

mitted that enforcement of this contract does not involve discriminations, preferences or rebates which the Interstate Commerce Act was designed to prevent, but instead provided a reasonable compensation to a carrier who under the circumstances attempted to and did comply with both the provisions of the State Regulatory Agency and the Interstate Commerce Commission.

2. The Petitioner, by its prior cause of conduct during the performance of the contract for Interstate carrier service and prior to this litigation, is estopped from raising the questions of the invalidity of the contract.

3. The Petitioner's position is devoid of equity. It is submitted that the Petitioner should not be allowed to retain the benefits received as a result of its application to the United States Air Force for additional compensation alleging in support thereof the non-negotiability and validity of the Respondents' claim and here deny the validity of such claim.

4. In its answer to the Respondents' Second Amended Complaint, the Petitioner admitted that a sum was due to the Respondents. The question of the invalidity of the contract was not raised until the appeal of the District Court Decision. It is submitted that it was not proper for this issue to be raised for the first time on appeal and that therefore the question is not properly before this Court.

For the foregoing reasons the Respondents respectfully submit that the Writ should be denied.

Dated at Williston, North Dakota this 13th day of October, 1967.

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SUPREME COURT, U. S.

NOV 6 1967

JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 662

ETS-HOKIN & GALVAN, INC., a Foreign Corporation,

Petitioner,

vs.

MAAS TRANSPORT, INC., a North Dakota Corporation, and B. L. LAWRENCE, doing business as LAWRENCE TRANSPORTATION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

Reply Brief to Respondents' Brief in Opposition to Petition for Writ of Certiorari

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In opposing the Petition for Writ of Certiorari, the Respondents have misstated certain facts in the record and raised additional questions which require clarification.

I.

Respondents Had No Applicable Tariff on File With the Interstate Commerce Commission, and the Hauling Without Such Filed Tariff Violated the Interstate Commerce Act.

Respondents seek to distinguish the cases cited by Petitioner in its Opening Brief by arguing that (i) they involved situations where the carrier had one tariff on file with the Interstate Commerce Commission and sought to charge the shipper a different tariff whereas here there was no tariff on file with the Interstate Commerce Commission at all, (ii) Respondents are entitled to claim the benefits of an intrastate tariff on file with the North Dakota Public Service Commission and (iii) the hauls in question were not determined to be interstate in character until after they were over.

It is submitted that these distinctions should not make for a dffferent result. The opportunity for mischief is just as great, if not greater, when no tariff is on file as when a different tariff is on file than the one sought to be charged. Interstate shippers are entitled to the protection of the impartiality and expertise of the Interstate Commerce Commission independent and apart from the action of state regulatory agencies. And the time when the interstate character of the haul is determined is completely immaterial.

Respondents, at Page 7 of their Brief, imply that an effective tariff for the hauls in question was on file by November 8, 1962. The Trial Court (R. 478), the Court of Appeals, (Pet. Brief, App. "A", p. 4, Lines 1-7), and the Interstate Commerce Commission (Pet. Brief, p. 4, Fn. 1) all found to the contrary.

II.

Respondents Knew That They Were Violating the Interstate Commerce Act When They Began to Haul.

Respondents attempt to convey the impression that they innocently thought this traffic to be in intrastate commerce.

(Brief in Opposition 1-2, 4, 7, 11.) The record indicates otherwise.

John Maas, president of Respondent Maas Transport, Inc., has been in the trucking business since 1926, engaging in interstate as well as intrastate hauls. (R. 108-110). The fact that Respondent Maas applied for interstate authority three weeks *before* the hauling began[1] makes it obvious that Maas knew the haul was in interstate commerce and that Respondents were acting illegally when they began to haul without authority.

III.

A Contract Which Cannot Be Performed Without Violating a Statute Is Void and Estoppel Cannot Apply to Allow Private Parties to Circumvent Public Laws.

The authorities cited by Respondents for their proposition that Petitioner should be estopped from raising the defense of invalidity of the contract do not involve illegality of contract and are inapposite. *Union Insurance Co. v. Wilkinson,* 13 Wall. 222, 20 L.Ed. 617 (1872), dealt with the validity of an insurance policy obtained by submitting a false application. *Glus v. Brooklyn E. Dist. Term.,* 359 U.S. 231 (1959), dealt with a Federal Employers' Liability Act action to recover damages for an industrial disease brought after the statutory three year period of limitation.

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1. On August 6, 1962, Maas filed with the Interstate Commerce Commission an "Application for Motor Carrier Certificate or Permit" to "institute a new operation . . . as a common carrier by motor vehicle, in interstate or foreign commerce . . . between [railheads] on the one hand and on the other hand, [missile sites], and between such launching sites. . . ." [Pl. Ex. 7; R. 105-106].

It is well settled that a contract which cannot be performed without violation of a statute is void and estoppel cannot apply, since, if the rule were otherwise, private parties could successfully avoid the requirements of legislation enacted for the protection of the public interest. As this Court said in *Scott Paper Co. v. Marcalus Mfg. Co.*, 326 U.S. 249 at 257 (1945):

> "For no more than private contract can estoppel be the means of successfully avoiding the requirements of legislation enacted for the protection of a public interest."

The reason for the rule is stated by this Court in *Continental Wall Paper Co. v. Louis Voight & Sons Co.*, 212 U.S. 227 at 262 (1909) as follows:

> "We hold that such a judgment cannot be granted without departing from the statutory rule, long established in the jurisprudence of both this country and England, that a court will not lend its aid, in any way, to a party seeking to realize the fruits of an agreement that appears to be tainted with illegality, although the result of applying that rule may sometimes be to shield one who has got something for which, as between man and man, he ought, perhaps, to pay, but for which he is unwilling to pay.
>
> In such cases the aid of the court is denied, not for the benefit of the defendant, but because public policy demands that it should be denied without regard to the interests of individual parties."

IV.

The Record Clearly Shows That Petitioner Did Not Receive Any Money from the United States Air Force for Cable Delay and Out-of-Sequence Cable; Respondents' Assertion to the Contrary Is Untrue.

Respondents assert that Petitioner's position is devoid of equity since it "received from the United States Air

Force a large amount of money for cable delay and out-of-sequence cable." (Brief in Opposition, p. 4, p. 9, Headnote 3, p. 11.) This assertion is false.

The record is uncontradicted that the claim referred to (Claim 44) was tentatively allowed, on January 15, 1964, solely for the purpose of negotiation (P. Ex. 147, R. 359, E-266) but later was rejected by the Air Force and subsequently waived by the contractor, by Supplemental Agreement No. 23, in December, 1964. (R. 31, 359-366).[2]

V.

The Question of the Illegality of the Contract Was Raised in the Pleadings and Decided by the Trial Court.

Respondents' contention that the issue of illegality was not before the Trial Court was presented to and rejected by the Eighth Circuit. (Appellees' Brief, 22, 25-26; Appellants' Reply Brief, 3-6).

The question was raised before the Trial Court in Petitioner's Amended Answer[3], (R. 8) and Second Amended

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2. The manner in which the Air Force viewed the claim is of interest here: "Complete analysis of this claim requires one further comment. The $80,676.43 claimed by the contractor involves supposed added cost to the government for the random movement of 108 reels of cable. This breaks down into approximately $800.00 per reel. Average transportation costs for loading and shipping a reel of cable from Bonham, Texas, to Minot, North Dakota, is approximately $200.00. In other words, according to the contractor, it costs far more to randomly move a reel of cable a few miles from the vicinity of the receiving point, than it does to ship a reel of cable 1800 miles from Texas. This appears so ridiculous that we refrain from further comment." (Pl. Ex. 139; R. 370, E-250 at 251).

3. "VI. Specifically denies that Maas Transport, Inc.'s interstate tariff covered said movement and in that regard alleges that Maas' interstate tariff was illegal, invalid and void with respect to the shipments alleged in the complaints." (R. 8)

Answer[4] (R. 10); it was raised during the trial by Motion to Dismiss (R. 279), by Motion to Strike the Inapplicable Tariffs (R. 475), and by Motion for a Directed Verdict (R. 475).

CONCLUSION

For the reasons hereinabove stated Petitioner respectfully reiterates its request that this Writ be granted.

Dated at San Francisco, California on November 6, 1967.

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4. "VI. Specifically denies that Mass Transport, Inc.'s interstate tariff covered said movement, and in that regard alleges that Maas Transport's interstate tariff was illegal, invalid and void with respect to the shipments alleged in the complaints." (R. 10)